IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DEWAYNE L. KATONGAN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11931 Trial Court No. 3AN-13-07314 CR MEMORANDUM OPINION No. 6333 — May 18, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Hanley Robinson, Attorney at Law, Anchorage, for the Appellant. Katholyn Runnels, Assistant District Attorney, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

Dewayne L. Katongan was convicted of second-degree assault and sentenced to 10 years with no time suspended. On appeal, he claims that there was

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

insufficient evidence to disprove self-defense and that his 10-year sentence is excessive. For the reasons explained here, we affirm his conviction and his sentence.

Background facts

Witnesses saw Katongan assault Ricky Fenton by striking him in the head with a rod or pipe. The victim fell to the ground. A witness confronted Katongan, who was preparing to strike the victim a second time. When the witness told Katongan that the police had been called, Katongan dropped the rod and then ran away. The witnesses provided police with a description of Katongan. The victim suffered a one-inch laceration to his head and was treated at Providence Alaska Medical Center.

Police soon located Katongan. A police sergeant had stopped another person as a result of the locate, and during this stop, Katongan — who had reason to believe that police were looking for him — approached the sergeant and handed him his identification card. The police sergeant turned Katongan over to another patrol officer and this officer interviewed Katongan, who denied being involved in the assault.

Katongan was charged with one count of second-degree assault. Superior Court Judge Kevin M. Saxby presided over a jury trial. At trial, Katongan testified that he had assaulted Fenton in self defense after Fenton threatened him with a knife. Fenton was apparently unavailable and did not testify at the trial. The jury did not credit Kantogan's testimony and convicted Katongan of the assault.

There was sufficient evidence to disprove Katongan's claim of self defense

On appeal, Katongan contends that because Fenton did not testify at trial, the jury was required to accept Katongan's version of events, and the evidence was therefore insufficient to convict him of assault.

When an appellate court reviews a claim of legal insufficiency on appeal, the court views the evidence — and all reasonable inferences from that evidence — in the light most favorable to upholding the verdict.[1] The court then asks whether, viewing the evidence in this light, a fair-minded juror could reasonably have concluded that the defendant was guilty beyond a reasonable doubt.[2] The appellate court does not re-weigh the evidence or assess witness credibility on appeal.[3] Those are matters for the jury to decide.[4]

Here, the evidence showed that Katongan did not tell the witnesses there was a knife involved when he was confronted during the assault on Fenton. Nor did he mention a knife during his fifteen-minute interview with police a short time after the assault. The first time that Katongan claimed that a knife was involved was during his testimony at trial.

Additionally, Katongan described a fairly large knife — one with a six-inch blade — which would be difficult to overlook. But the witnesses did not see Fenton with a knife, nor did the police find a knife when they arrived at the scene.

Viewing the evidence at Katongan's trial in the light most favorable to upholding the assault conviction, it is clear that fair-minded jurors could reasonably conclude that the State had met its burden in this case. The jury could draw a reasonable inference that his testimony was not credible because Katongan never mentioned a knife until he testified at trial, despite two obvious opportunities to do so.

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1 *Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

2 *Id.* at 849.

3 *Id.*

4 *Id.*

Why we conclude Katongan's sentence was not excessive

Katongan was convicted of second-degree assault, a class B felony.[5] The maximum term of incarceration for a class B felony is 10 years.[6] As a fifth felony offender, Katongan faced a presumptive range of 6 to 10 years.[7]

After finding Katongan a worst offender, the court imposed the maximum sentence — 10 years to serve, with no time suspended. Katongan contends that the court erred when it found him a worst offender, and that the 10-year sentence is excessive.

A worst-offender finding is required before a trial court can impose a maximum sentence.[8] A worst-offender finding can be based either on the defendant's current offense or the defendant's criminal history, or both.[9]

Here, the court based its worst-offender finding on Katongan's current offense and his criminal history. The court found that Katongan had intentionally committed a "significant assault with a ... potentially very deadly weapon," and that but for Katongan's inebriation and the timely intervention by witnesses, a "much more substantial injury would have occurred."

Katongan's criminal history included four prior felony convictions, thirty-six misdemeanor convictions, and fourteen probation revocations over twenty-two years. According to the prosecutor, all four felony convictions "culminated in a complete

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[5] AS 11.41.210(b).

[6] AS 12.55.125(d).

[7] *See id.*

[8] *See, e.g.*, *State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975); *Howell v. State*, 115 P.3d 587, 592-93 (Alaska App. 2005); *Napayonak v. State*, 793 P.2d 1059, 1062 (Alaska App. 1990).

[9] *Howell*, 115 P.3d at 593.

revocation with [Katongan] serving the remainder of [his] time." The prosecutor acknowledged that alcohol abuse "seems to be the basis" of Katongan's ongoing criminal conduct, but the prosecutor also pointed out that Katongan had not taken advantage of multiple opportunities to address his alcohol problem. The prosecutor noted that the only time Katongan was not committing new crimes was when he was incarcerated.

Katongan did not disagree with the prosecutor's recitation of his criminal history, his substance abuse, or his abysmal performance while on probation.

We conclude that this record supports the court's worst-offender finding.

Katongan separately argues that the sentence imposed is excessive because a shorter term "within the presumptive range" would have accomplished the goals that the court found most important in this case: community condemnation, reaffirmation of societal norms, and isolation to protect the public.

When imposing the sentence, the judge focused on community condemnation, reaffirmation of societal norms, and isolation to protect the public because he found Katongan had little hope for rehabilitation, given his history of failed treatment and probation and parole violations. The judge also found that the maximum sentence was necessary to make it clear that ongoing and frequent acts of criminal behavior "will not be tolerated" and because "society needs to be protected."

The record supports the judge's conclusion that Katongan is unwilling or unable to seriously address his alcohol abuse problem, and that he is unwilling or unable to follow court orders or release conditions while on probation or parole. The record also supports the judge's finding that the assault was serious, and could have been even more serious had the witnesses not intervened.

Having independently reviewed the sentencing record, we conclude that the sentence — although lengthier than other judges might have imposed — was not clearly mistaken.[10]

Conclusion

The judgment of the superior court is AFFIRMED.

[10] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).